# No. 15,445

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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PLUMBING AND PIPE FITTING LABOR-MANAGEMENT RELATIONS TRUST, et al.,
*Appellants,*

vs.

CONDITIONED AIR AND REFRIGERATION CO., a corporation, et al.,
*Appellees.*

**On Appeal from Order and Judgment of District Court.**

## BRIEF ON BEHALF OF APPELLANTS.

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## BRIEF ON BEHALF OF APPELLANTS.

### JURISDICTION.

This action arose under the provisions of Section 302, subdivisions (a) and (b) of Labor Management Relations Act, as amended (29 U.S.C. sec. 186) and jurisdiction of said action was conferred upon the Court below by the provisions of Section 302 Subdivision (e) LMRA 1947 (paragraphs 1 and 2 of the complaint for injunction). (R. 4.)

Defendants and Appellants are——

Plumbing and Pipe Fitting Labor-Management Relations Foundation, a Trust, (R. 10, 17) hereinafter referred to as Foundation or Trust.

Local Union No. 246 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, a local labor union, a labor organization, hereinafter referred to as Local Union or Local 246. (R. 4, 5, 10.)

Pipe Trades District Council No. 36 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada is an association of labor unions, a labor organization, hereinafter referred to as District Council No. 36 or District Council. (R. 11.)

Paul Reeves was an officer of Local No. 246 and District Council No. 36. (R. 5, 11.)

Appellees and Plaintiffs are four contractors who separately and individually collectively bargained with the District Council or its predecessor as an Employer, hereinafter called Employer or Employers. (R. 45, 46.)

The Court has jurisdiction to review the judgment and order in question under the provisions of Title 28 United States Code, Section 1291.

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## STATEMENT OF THE CASE.

Section 302(a) of the *Labor Management Relations Act, 1947,* as amended, provides as follows:

> "It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce."

Section 302(b) of the *Labor Management Relations Act, 1947,* as amended, provides as follows:

> "It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, from the employer of such employees any money or other thing of value."

The collective bargaining agreement of the Valley Group Negotiating Committee (a labor organization, recognized as the sole and exclusive collective bargaining representative of all employees of the Individual Employer performing work covered by the collective bargaining agreement) (R. 50, 53; 59, 60; 62) did and the collective bargaining agreement of District Council No. 36, its successor (a labor organization, similarly recognized as such sole and exclusive collective bargaining representative of all said employees) (R. 107 Printed Booklet), provides that each Individual Employer, covered by the collective bargaining agreement, on work covered by said collective bargaining agreement, performed in the counties of Fresno, Madera, King and Tulare of the State of California, shall pay into the Plumbing and Pipe Fitting Labor-Management Relations Foundation (a Trust) ten (10¢) cents per hour for each hour worked by each employee of each Individual Employer covered by the said collective bargaining agreements.

The Plumbing and Pipe Fitting Labor-Management Relations Foundation (a Trust) was not created by the said Valley Group Negotiating Committee or District Council No. 36. (R. 21, 39, 40.)

The Plumbing and Pipe Fitting Labor-Management Relations Foundation (a Trust) was created by, and its

trustors are, Associated Plumbing Contractors, Inc. (a non-profit membership corporation composed of Individual Employers, Contractors licensed by the Contractors' State Licensing Board of the State of California), Individual Employers similarly licensed but not members of said Association, and Local Union No. 246 (a labor organization, a local union). (R. 21, 39, 40.)

The basic issue is whether such payments into the trust, the Plumbing and Pipe Fitting Labor-Management Relations Foundation, or the agreement so to do, is a payment of money or agreement to pay money to a representative of the Individual Employers' employees in violation of said Section 302(a), and whether the receipt and acceptance of such payments by the trust, the Plumbing and Pipe Fitting Labor-Management Relations Foundation and Its Trustees, or the agreement so to do is a receipt or acceptance of or agreement to accept money by a representative of the Individual Employers' employees in violation of said Section 302(b).

In other words, is the Trust or the Trustees, or both, Representatives of employees within the meaning of the Act.

Appellants maintain the Trust is not and each Trustee is not such a representative. Appellees maintain the Trust is and each Trustee is such a representative.

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## SPECIFICATION OF ERRORS.

1. The Court erred in granting plaintiffs' motion for summary judgment, and denying defendants' motion for summary judgment.

2. The Court erred in its Findings of Fact.

3. The Court erred in its Conclusions of Law.

4. The Court erred in its Judgment.

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## ARGUMENT.

### INTRODUCTION.

Since the decision in this case will not only affect the immediate parties but indirectly the hundreds of Labor-Management trusts, non-profit corporations and Committees, as well as Apprenticeship and Training Funds, Industrial Safety Committees, Grievance Committees, Arbitrations and many other aspects of the employer-employee relationship, we think it necessary and advisable not only to set out and discuss those decisions of the Courts which appear to counsel to be of assistance in arriving at a conclusion, but the legislative history of Section 302 of the *Labor-Management Relations Act of 1947,* and the serious and pertinent social interests involved as well as the impact of Labor-Management cooperation on the economic life of our country.

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### THE TRUST INSTRUMENT.

The trust instrument recited that the trustors—

> ". . . are desirous of forming and perfecting an organization for the purposes of improving the relations between the employers and employees making up the Plumbing and Pipe Fitting Industry, and the Plumbing and Pipe Fitting Industry and the general public, and to enforce the collective bargaining agree-

ment and the provisions thereof covering work within the jurisdiction of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, to protect the wages, rates of pay, hours of labor and other conditions of employment of the employees in the Plumbing and Pipe Fitting Industry and to protect the general public from imperfect, improper and unsanitary installations, poor or shoddy materials and poor or improper work and workmanship."

(R. 22.)

and that—

". . . there is presently no effective machinery whereby the provisions of applicable collective bargaining agreements can be policed and enforced and whereby the general public can be protected from imperfect, improper and unsanitary installation, poor or shoddy materials or poor or improper work and workmanship."

(R. 22, 23.)

and that—

". . . the absence of such effective machinery is producing chaos in the Plumbing and Pipe Fitting Industry and is endangering the wages, rates of pay, hours of labor and other conditions of employment of the employees and destroying the trust and confidence of the public in the employers and in the plumbing and pipe fitting industry."

(R. 23.)

and that—

". . . to correct this situation, to protect the wages, rates of pay, hours of labor and other conditions of

employment of the employees, to restore the trust and confidence of the public in the employers and the plumbing and pipe fitting industry, this Trust is created."

(R. 23.)

The truth of these recitations as a fact is nowhere questioned by plaintiffs.

The trust instrument authorizes the trustees to pay out the assets of the trust.

". . . for the general welfare of the Plumbing and Pipe Fitting Industry and without in any way limiting the foregoing for the purpose of improving the relations between employers and employees making up the Plumbing and Pipe Fitting Industry, and the general public and to protect the wages, rates of pay, hours of labor, and other conditions of employment of the employees in the Plumbing and Pipe Fitting Industry, to protect the general public from imperfect, improper and unsanitary installations, poor or shoddy materials and poor or improper work and workmanship, to enforce the collective bargaining agreements and the provisions thereof covering work within the jurisdiction of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada."

(R. 28.)

The Trust instrument provides—

"The Trust shall be administered by a Board of Trustees which shall consist of five (5) Trustees appointed by the Associated Plumbing Contractors of

Central California, Inc. and five (5) Trustees appointed by the Union."

(R. 23, 24.)

"The Trustees appointed by the Associated Plumbing Contractors of Central California, Inc. shall be appointed in writing and shall serve at the pleasure of said Associated Plumbing Contractors of Central California, Inc. The Trustees appointed by the Union shall be appointed by the Union in writing and serve at the pleasure of said Union. Each original Trustee shall sign the Trust Agreement or a duplicate thereof, and such signature shall constitute his acceptance of office."

(R. 24.)

The number of Trustees was later increased to twelve (12), six (6) appointed by the Association and six (6) appointed by the Union. (Exhibit C, Ans. p. 2.)

The trust instrument likewise provides for the bonding of trustees and employees of the trust (R. 30, 31) and for annual audits which shall be available for the inspection of all interested persons. (R. 31.)

In addition, to clearly differentiate, separate and set the trust apart from its creators and beneficiaries, the trust instrument provides:

"Neither the Employer, any Individual Employer, The Unions, any individual employee nor any other beneficiary shall have any right, title or interest in the Trust other than as specifically provided in this agreement, and no part of said fund shall revert to the Employer or any Individual Employer. Neither the Trust nor any payments to the Trust shall be in

any manner liable for or subject to the debts, contracts or liabilities of Employer or Union or of any Individual Employer, or any individual employee.''

(R. 26, 27.)

''Neither the Employer, any Individual Employer, the Union nor any individual employee shall be liable or responsible for any debts, liabilities or obligations of the Trust or the Board of Trustees.''

(R. 27.)

''The duties, responsibilities, liabilities and disabilities of the Board of Trustees or any Trustee shall be determined solely by the express provisions of this Agreement and no further duties, responsibilities, liabilities or disabilities shall be implied.''

(R. 34.)

''The Board of Trustees shall not be liable for the acts or omissions of the Employer or any Individual Employer signatory hereto, or the Union signatory hereto.''

(R. 34.)

''Neither the Union, nor any member, officer, agent, employee or committee member of the Union shall be liable to make payments into the Trust or be under any other liability to the Trust except to the extent that he may incur liability as an Individual Employer or as a trustee as herein provided, or both''.

(R. 27.)

''Neither the Employer, any Employer association or Individual Employer represented by Employer,

any employer representative nor the Union or any Union representative or member of employee represented by the Union shall be liable in any respect for any of the obligations of the Board of Trustees because any Trustee member or members are in any way associated with any such Employer, Employer Association, Individual Employer, or Union."

(R. 35.)

So that no trustee may directly or indirectly profit from this trust, the Trust Instrument provides:

"The Trustees shall be reimbursed out of the Trust for expenses incurred by them in attending meetings or in the performance of any other duty or act pursuant to this Agreement in such amount as the Board of Trustees may from time to time determine. *No Trustee shall receive any fee for his services as a Trustee,* provided, however, that nothing herein contained to the contrary shall prevent or impede the employment by the Board of Trustees of any Trustee or the payment of any sum to or for any Trustee for services other than as Trustee". (Emphasis added.)

(R. 35.)

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## HISTORICAL BACKGROUND OF LABOR MANAGEMENT RELATIONS.

It has well been said that there are three types of labor-management relationships.

"(a) *Armed truce:* A relationship in which the parties are convinced that their objectives are in fundamental conflict, resulting in a struggle for power between them and a great deal of competition for worker loyalties.

(b) *Working harmony:* A relationship in which the parties find that they have common interests in fairly broad areas, and where they see the advantages of compromise in areas of conflicting interest.

(c) *Union-management cooperation:* A relationship where the interests of the parties in pursuing their objectives are identical in most important respects and where there is active cooperation in increasing sales, lowering costs and solving production problems."

Research on Labor-Management Relations Report of Conference held February 24-25, 1949 at Industrial Relations Section, Princeton University, by Myers and Turnbull.

While this description is useful in classifying the different types of relationships between management and labor it also provides a quick summary of the various steps through which labor and management have in some cases, as in the instant case, progressed but in most cases are progressing.

These classifications set out the classic history of the evolution of labor-management relations in general.

The employees and employers here involved have passed through stages (a) and (b) and on February 9, 1954 when the trust, the Plumbing and Pipe Fitting Labor-Management Relations Foundation, was created, entered hesitantly but confidently into stage (c), one of active cooperation.

Appellants reject the assumption that labor relations and collective bargaining must forever remain an Armed Truce, or, at best, achieve only Working Harmony.

Thus, as stated in "Human Relations in Modern Business", *"A Guide For Action Sponsored By American Business Leaders"*, published by Prentice-Hall, Inc.:

> *"A genuine attitude of trusteeship, or social responsibility, on the part of both labor and management, would do much to better the tone of modern society. It would lessen the conflicts between capital and labor. There would be more of a sense of co-operation for common objectives, and less of the trend toward economic warfare.* A factory would be recognized as a true community rather than a battleground where an armed truce prevails.
>
> "An attitude of trusteeship could modify certain forms of competition that business men and others condemn as antisocial. The nineteenth century saw society swing between two extremes; a ruthless competition that tended to exploit labor, disregard the consumer, and crush weaker business men; and a trend toward economic concentration, which fostered monopoly, industrial autocracy, and economic instability. In an atmosphere of trusteeship, the real merits of competition—the fostering of initiative and resourcefulness, and the making of a better and cheaper product—could be maintained without turning economic life into a pitiless struggle for survival. Likewise, the merits of business co-operation, tending toward industrial stability, could be retained without those monopolistic conditions that sometimes impair economic freedom, hold back technological improvement, or exploit the consumer". (Emphasis added.)
>
> (pp. 3-4.)

> *"It is a matter of good sense that where people have common concerns, they get together to handle them. We know that both labor and management have*

> *a joint interest in increased production. Likewise, both are concerned that employees have good jobs and a constantly improving standard of living. Certainly we can do more to secure these goals by working together than by pulling apart.''* (Emphasis added.)
>
> (p. 6.)

This challenge, this opportunity, has been taken up not only by the employers and employees here involved, but by many others. Not only by the creation of the Plumbing and Pipe Fitting Labor-Management Relations Foundation, but by the creation of an Apprenticeship and Training Fund, a Trust (Exhibit A, Ans. p. 14), to implement the provisions of the Shelly-Maloney Act (Apprentice Labor Standards Act), Sections 3070 et seq. Labor Code, State of California.

Not only have farsighted and sincere employers and unions done so of their own accord, but the Federal Government, in the interest of national defense, has fostered and encouraged what the employers and employees have done here.

In ''Labor and Management In A Common Enterprise'', by Dorothea de Schweinitz, a Wertheim Fellowship Publication, Harvard University Press, we find——

> ''During World War II the writer, first in the Labor Division of the War Production Board, had the opportunity to read committee minutes and reports and to visit some of the more successful committees in order to develop better techniques as part of her duties as chief of the Committee Standards Branch. *From the beginning of the War Production*

*Drive in March 1942 until the close of the war a variety of War Production Board representatives visited war plants to promote committees to assist trouble spots and to observe good techniques.* (Emphasis added.)

(pp. 2-3.)

"*Labor-Management committees, just as other union-management relations, vary in their degree of development.* The growth of cooperation is gradual. A first stage can be designated as 'information-sharing' in which an employer looks upon the joint committee as a means of informing employees about business conditions and the outlook for their company, as well as telling them about changes in operating methods before they are put into effect. . . . A further development is seen in 'problem-sharing'. Here the employer recognizes that workers can make a contribution in certain areas. The company has not been able to solve a problem of high unit costs, poor quality, or waste in materials. In a series of committee meetings management presents the facts and labor is requested to give its opinion on the difficulties described or to make proposals for improving the situation.

"In the third stage of development management indicates a willingness to have labor initiate ideas in any kind of production and personnel activities; and labor, with certain safeguards, is willing to contribute thus to the operation of the business. In this phase of 'idea-sharing' management provides information to a greater degree than in the previous stages of 'information-sharing' and 'problem-sharing'. Labor and management are indeed engaged in a common enterprise.

"As among the three types of union-management cooperation, it will not be possible always to differentiate in this volume. Most of the descriptions of labor-management committee operations are based on the experience which, during World War II, came upon unions and companies in various stages of development. Some of the committees described continue to function today."

(p. 4.)

"*During the war some five thousand labor-management committees were organized in factories, mines, and shipyards in the United States.*" (Emphasis added.)

(pp. 4-5.)

"An important contribution of the American committees to union-management cooperation in the United States lies in the procedures which were developed. Few theories were expounded. No decrees or laws gave authority to committees. No national employer-union agreements established functions and methods of work. The experiment, however, extended to a larger number of industries and establishments than could have been predicted from prewar experience in union-management cooperation. Production was aided both directly and indirectly through the practical programs developed by employer and union representatives in individual plants. Although tribute was paid to technical suggestions made by workers, *the significant development lay in the joint deliberations of committee members.*

(pp. 5-6.)

"*The labor-management production committees, while no panacea for the complex problems of the*

*total economy, indicates an attitude of reasonableness and exploration. No employer and no union, still in the stage of armed truce, will set up a joint committee of real value.''* (Emphasis added.)

(p. 15.)

''Cooperation at the plant level, with respect between the parties, may be the route toward the achievement or order and equity without loss of liberty. It provides a training ground for reasoned thinking and just dealing. Consideration of each problem as it affects employer, worker, the union, and the public, the 'orchestration of human interests' within the factory, may become for this country the next development in democratic procedure''. (Emphasis added.)

(pp. 18-19.)

In ''Labor-Management Co-operation and How To Achieve It'' by Leven and Goodell, we find——

*''The purpose of the Joint Production Committee is to use every man's facilities—to stimulate, develop, and implement everyone's participation—for the good of the enterprise, and all those engaged in it. It is composed of an equal number of management and workers' representatives.''* (Emphasis added.)

(p. 7.)

''As President Herman W. Steinkraus, of the Bridgeport Brass Company, says: 'We all know that the last 50 years have shown the brilliant progress of industrial engineering and manufacturing, by which people enjoyed more physical comforts and conveniences at lower and lower prices. I believe in the . . . (coming) . . . years *the greatest progress in industry will be*

*what we may term human engineering, the exploring of the unlimited possibilities of human beings by working together for a common cause, through mutual understanding, respect and teamwork.''* (Emphasis added.)

(p. 3.)

In *''Human Leadership in Industry The Challenge of Tomorrow''* by Sam A. Lewisohn, President Miami Copper Company-Past President American Management Association, we find——

''Wise experimenters realize that they are not unlike wayfarers stumbling along an unfamiliar path in the dark, they can only feel their way. They are aware that to reach ultimate ends the modifications they attempt in the industrial system must be short steps in the right direction.

*''One such step was the principle of consultation.* It was the basis of employee representation and it has its place today in relationships with trade-unions. Employee representation came from management as a vehicle to assist management leadership. Unionism started essentially as a method of protest by labor. Today in this country it has become mainly a means of collective bargaining, constituting a species of business 'dicker' over terms of employment. The resulting agreement between management and labor should as far as possible be in a form that benefits both parties and society as well.'' (Emphasis added.)

(p. 2.)

*''Therefore plans for union-management cooperation should be regarded as means which the management officials utilize to assist them in their function of leadership compatible with democratic ideals and*

*for tapping the creative resources of the rank and file.''* (Emphasis added.)

(p. 3.)

*''When employers recognize the vital need of developing opportunities for labor to cooperate in production, unions will more widely assume the role predicted for them by their friends. The standards by which the competence of union leaders and the effectiveness of a union itself will be judged will be those relating to general well-being, economic and social.* Industrial relations will more and more be directed toward progressive industrial methods and national purposes and less and less to defensive strategy and bargaining. Unions, with their array of leadership and talents, will become a potent force in national productiveness. *Hence the resourceful, socially responsible employer regards it as part of his professional duty to develop constructive methods of co-operation with unions. He regards it as a real opportunity in social experimentation.''* (Emphasis added.)

(p. 5.)

That is the background, those are the forces at work in the field of Industrial Relations.

Those who seek through co-operation to improve the general welfare of industry are arrayed against those who insist that our country and the public must live in an economy in which capital and labor must be forever locked in a cold and hot war.

The employers, the employer association and the local union and the District Council here involved have elected to pursue the path of co-operation and have turned their backs on both the cold and the hot war.

This effort to benefit the Plumbing and Pipe Fitting Industry through the co-operation of employers and employees—fostered and encouraged during the Second World War by the Federal Government—is now claimed by plaintiffs to be illegal on the theory that the independent entity, the Trust, created to provide a vehicle for cooperation is a "representative" of the employers' employees within the meaning of the Labor-Management Relations Act, 1947.

We submit that plaintiffs are in error and that there is nothing in Section 302 of the Act which prohibits employers and their employees from agreeing to set up and setting up an independent entity for the general welfare of the industry and financing it by employer payments measured by the hours of work performed by employees.

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**SECTION 302—ITS LEGISLATIVE HISTORY.**

Subsection (a) of Section 302 prohibits the payment or delivery or any agreement to pay or deliver money or any other thing of value by an employer to a "representative" of his employees.

Subsection (b) of Section 302 prohibits a "representative" of an employer's employees from accepting or agreeing to accept or receive any money or other thing of value from such employer.

We put the word "representative" in quotation marks to point up two important facts:

1. It is a word of art, and

2. The prohibition of the statute applies to no other ndividual or entity.

There is no question but that the word "representative" includes any and every individual and labor organization that acts as the collective bargaining representative of employees in an industry affecting commerce within the meaning of the act.

For some time there was a doubt as to whether the word "representative" included certain officers of a labor organization who participated in the collective bargaining negotiations as the agent of a labor organization which was itself a "representative." This doubt has been resolved by the United States Supreme Court.

In *U.S. v. Ryan,* 100 L. Ed. (Advance p. 272) (27 LRRM 2582), the Supreme Court said:

> "Ryan was president of the International Longshoremen's Association (ILA) during the years 1950 and 1951. *The ILA and its affiliated groups* were the recognized collective-bargaining agents for longshore labor in the Port of New York and *bargained through a wage scale committee of which Ryan was a member. He signed the agreements negotiated during that period . . .*"
>
> (p. 272.)

> ". . . We do not decide whether any official of the union is ex officio, a representative of employees under Sec. 302. *We believe, however, that respondent's relationship brings him within that term.*" (Emphasis added.)
>
> (p. 274.)

Thus, an officer of a labor organization which is itself a "representative" *may* be a "representative" depending, it appears, on the extent to which his duties and activities are related to the collective bargaining process.

Thus, we find that the persons and entities within the ambit of the prohibited conduct, "representatives" are:

1. Individuals acting as the collective bargaining representatives of employees.

2. Labor organizations acting as the collective bargaining representatives of employees.

3. Those officers of labor organizations acting as the collective bargaining representatives of employees who participate actively in the collective bargaining process.

4. The issue as to other officers of a labor organization acting as the collective bargaining representative of employees is apparently still an open question.

Thus, unless the person or entity to which payment or delivery of money or other thing of value is made or agreed to be made is a "representative," the payment or agreement to pay is not within the prohibition of Section 302(a) and (b).

The Plumbing and Pipe Fitting Labor-Management Relations Foundation is not a "representative" within the meaning of the Act. It has no connection with the collective bargaining process at all.

The proviso contained in subsection 302(c) which excepts certain payments or agreements to pay a "representative" does not change the fact that the subsections (a) and (b) apply only to a "representative" and not to any other person or entity.

First it excludes from the prohibitions of subsections (a) and (b), (1) "representatives" who are also employees, (2) legitimate payments to "representatives" re-

sulting from legitimate disputes or torts, (3) purchase or sale of commodities to "representatives," (4) payment to a "representative" of dues checked off by employers subject to certain restrictions, and (5) money paid to certain trust funds *established by such "representative"* subject to certain restrictions.

It should be here noted that the trust fund here in issue was not unilaterally established by Local 246.

Subsection (g) provides that if the Health and Welfare or Pension Trust Fund was established by the "representative" prior to January 1, 1946, the restrictions provided in subsection (c) (5) have no application. To trusts established by the "representative" prior to January 1, 1947. *Upholsterers Union v. Leathercraft Co.,* 82 Fed. Supp. 570, 23 LRRM 2315.

Care must be taken not to confuse the exception with the rule.

The rule is that no payments may be made to or accepted by a "representative" except that certain payments may be made to and accepted by a "representative" and certain other payments may be made directly to and accepted by a "representative" if they are made to the "representative" and the "representative" accepts them in trust and that trust contains certain provisions.

Senator Taft summed up the matter when he said:

> "The amendment provides first that——
>
> "It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees.

*"That is, it may be said, in a case of extortion or a case where the union representative is shaking down the employer.* Certain exceptions are made.

"Provision No. (5) at the bottom of page 2 and the top of page 3 of the amendment deals with the question of welfare fund. It provides that the payment must be made, in the first place, as found in line 25 on page 2, 'to a trust fund established by such representative'—*that is by the union*—'for the sole and exclusive benefit of the employees of such employer, and their families and dependents, or of such employees, families, and dependents jointly with the employees of other employers making similar payments and their families and dependents.

In other words, this must be a trust fund. *It cannot be the property of the union without a definite statement that it is in trust for the employees, who after all have earned the money."* (Emphasis added.)

(Congressional History Labor Management Relations Act, 1947, p. 1311, Col. 2.)

We note first that it is clear beyond question that the Foundation was not created for the purpose of "extortion" nor is it a case where a union representative is "shaking down an employer."

The manner of its creation (R. 46, 39, 40), clearly and unequivocally negatives such implication as does the stipulation of facts.

"That no demand has been made on plaintiffs, or any of them, or any other employer at any time prior to the date of this stipulation, and none is now made by Pipe Trades District Council No. 36, Local Union No. 246, Paul L. Reeves, or the business manager or

any officer, agent or employees of said District Council or Local Union other than to contract to pay and to pay into said Foundation." (R. 49.)

We note that the money paid in the instant case is not the property of the Union at any time and it is not the property of any Union officer at any time, it is the property of the Plumbing and Pipe Fitting Labor-Management Relations Foundation, a trust.

This interpretation seems to meet with the approval of the United States Supreme Court which in *U. S. v. Ryan,* supra says:

> "Further, a narrow reading of the term 'representative' would substantially defeat the congressional purpose. In 1946 Congress was disturbed by the demands of certain unions that the employers contribute to 'welfare funds' *which were in the sole control of the union or its officers and could be used as the individual officers saw fit.* The United Mine Workers' demand that mine operators create a welfare fund for the union by contributing 10 cents for each ton of coal mined, caused the Congress to act. The Case Bill, H. R. 4908, 79th Cong., 2d Sess. which regulated welfare funds in a manner similar to Sec. 302, was enacted in 1946, but was vetoed by the President. The following year the Taft-Hartley Act containing Sec. 302 was passed over another veto. But if 'representative' means only the 'exclusive bargaining representative' the explicit limitations on welfare funds in Sec. 302 (c) (5) may be easily evaded. Payments made directly to union officials, or to other individuals as trustees would apparently be excluded from Sec. 302. Thus, a narrow construction would frustrate the primary intent of Congress.

"Nor can it be contended that in this legislation Congress was aiming solely at the welfare fund problem. Such a suggestion is supported neither by the legislative history nor the structure of the section. The arrangement of Sec. 302 is such that the only reference to welfare funds is contained in Sec. 302 (c) (5). If Congress intended to deal with that problem alone, it could have done so directly without writing a broad prohibition in Sec. (a) and (b) and five specific exceptions thereto in subsection (3) only the last of which covers welfare funds. *As the statute reads, it appears to be a criminal provision, malum prohibitum, which outlaws all payments, with stated exceptions, between employer and representative.*" (Emphasis added.)

(pp. 275, 276.)

and we may properly add as a corollary does not outlaw or forbid payments to and acceptance by those persons and entities who or which are not "representatives."

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**THE PLUMBING AND PIPE FITTING LABOR-MANAGEMENT RELATIONS TRUST IS NOT A "REPRESENTATIVE" AND ITS TRUSTEES ARE NOT "REPRESENTATIVES".**

There is no question but that the Plumbing and Pipe Fitting Labor-Management Relations Foundation is a trust, a valid subsisting trust.

"Trusts are either expressed or implied, the former being such as are raised or created by the act of the parties. . ."

*Walden v. Skinner,* 101 U.S. 577, 25 L. Ed. 963.

"It needs no particular form of words to create a trust, so there be reasonable certainty as to the prop-

erty, the objects and the beneficiaries . . . the trust is not perfectly created unless the legal interest be actually vested in the trustee . . . Various instruments may be read together to ascertain the intention to establish one."

*Chicago M. & S. P. R. Co. v. Des Moines U. R. Co.,* 254 U.S. 196, 208, 41 S.Ct. 81, 65 L. Ed. 219, 227.

"Sections 2221 and 2222 of the Civil Code (State of California) define the method by which a valid trust may be created. If there is (1) an intention on the part of the settlor to create a trust and if (2) the subject of it, the purpose for which it is created, and the beneficiaries are indicated with reasonable certainty, and if (3) the trustees accept the trust, the elements are complete."

*Randall v. Bk. of America,* 48 C.A. (2d) 249-254;
*Quinn v. Central Co.,* 104 F. (2d) 450-452 (9th Circuit).

It is clear that Plumbing and Pipe Fitting Labor-Management Relations Foundation meets the test outlined by the United States Supreme Court and the decisions and statutes of the State of California.

Now a trust is not an agency, nor is a trustee an agency, nor is a trustor trustee an agent. As said in *Corpus Juris Secundum:*

"The essential distinctions between a trust and an agency are to be found ordinarily in the fact that in a trust the title and control of the property under the trust instrument passes to the trustee who acts in his own name, while the agent represents and acts for his principal, and in the further fact that while a trust may ordinarily be terminated only by the fulfillment

of its purposes an agency may in general be revoked at any time."

(2 C.J.S. 1034.)

"The powers and duties of a trustee are radically different from those of an agent. The agent's duty is primarily to his principal for whom he acts and to whom he must account to the cestui que trust, although his authority comes from another. The agent represents and acts for his principal, but a trustee has no principal and cannot render the creator or beneficiary of the trust liable for his contracts."

(2 C.J.S. 1035.)

The same thought is expressed by the United States Supreme Court as follows:

"A trustee is not an agent. An agent represents and acts for his principal, who may be either a natural or an artificial person. A trustee may be defined generally as a person in whom some estate, interest or power is vested for the benefit of another."

*Taylor v. Mayo,* 110 U.S. 330-335, 4 S.Ct. 147 28 L. Ed. 163, 165.

That a "representative" within the meaning of Section 302 of the Labor Management Relations Act, 1947, is an agent is, we submit, beyond question.

In speaking of what an agent is *Corpus Juris Secundum* says:

"An agent is one who, by the authority of another, undertakes to transact some business or manage some affairs on account of such other, and to render an account of it. He is a substitute, or deputy, appointed

> by his principal primarily to bring about business relations between the latter and third persons."
>
> (2 C.J.S. 1025.)

The California *Civil Code* Section 2295 defines an agent as follows:

> "An agent is one who represents another called principal in dealings with third persons. Such representation is called agency."

In *U. S. v. Ryan* (supra) the court uses "collective-bargaining agents" and "exclusive bargaining representative" (p. 273) interchangeably and closes with the statement:

> "We conclude therefore that Sec. 302 prohibits payments to individuals who represent employees in their relations with the employers."
>
> (p. 277.)

The "Representative" referred to in Section 302(a) and (b) of the *Labor Management Relations Act, 1947,* is, we submit, an agent, an agent specifically of the employees of the employer paying or delivering or agreeing to paying or delivering or agreeing to pay or deliver, and are not, therefore, within the class of persons or entities against whom the prohibition in the statute is directed.

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**THE PLUMBING AND PIPE FITTING LABOR-MANAGEMENT RELATIONS FOUNDATION COULD NOT ACT AS A "REPRESENTATIVE OF EMPLOYEES".**

One of the factors which lead to the creation of the Plumbing and Pipe Fitting Labor-Management Relations

Foundation was that there was no effective machinery whereby the provisions of applicable collective bargaining agreements could be policed and enforced.

One of the powers of the Trust specifically enumerated is to enforce the collective bargaining agreements and the provisions thereof.

The collective bargaining agreement Exhibit A attached to the Answer provides:

> "Section 17 Joint Conference Board. (A) In those areas in which labor-management set up shall function as a Joint Conference Board with all the powers, rights, duties and obligations hereinafter lodged in the Joint Conference Board."

One of the powers of the Joint Conference Board and therefore the Trust is to hear disputes and differences which may arise in the enforcement or interpretation of the agreement.

It is axiomatic that an arbiter cannot represent one side or the other.

To say that the employers, the employee associations, the unions, the District Council and the employees agreed to place the "enforcement and interpretation" of the collective bargaining agreement in the sole control of the "representative of the Employees of the employer" is to advance a proposition which is erroneous on its face.

Agreements to arbitrate are specifically enforceable in this state, particularly collective bargaining agreements, *Levy v. Superior Court* (1940) 15 C. 2d 692, 104 P. 2d 770, 129 ALR 956.

The parties were and are well aware of that fact.

Thus when the parties contracted for the settlement of disputes under, and the interpretation of, the collective bargaining agreement by the Plumbing and Pipe Fitting Labor-Management Relations Foundation they did so with the full realization of the fact that the provisions of Title IX of the *Code of Civil Procedure* of the State of California were controlling.

Section 1288 provides for vacating an award procured by corruption, fraud or under means or where there was corruption in the arbitrator or any of them or other misbehavior.

Certainly the parties did not build into the arbitration procedures of their contract an automatic vacation of any award by appointing as the arbitrator one of the "representatives" of one of the parties.

Men are presumed to act reasonably and with due regard for their own person and property and the law.

There is nothing in this record to indicate that the parties intended or desired to perform a useless act when they provided for arbitration by Plumbing and Pipe Fitting Labor-Management Relations Foundation.

However, if it is a "representative" of employees of the employer and not a separate and distinct entity from the employers, employer associations, unions, District Council and employees they have not only performed a useless act but an inherently foolish and unreasonable one.

They would have denied due process to the employer party to the dispute and rendered the arbitration void without recourse to statute.

We respectfully submit that the parties to the collective bargaining agreement and the creators of the trust did not so act and the trust and its trustees are independent entities not "representatives" of the employees.

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**THE APPLICABLE DECISIONS OF THE COURTS.**

The Courts of the State of California have in *Bay Area Painters and Decorators Joint Committee, Inc. (a non-profit corporation) v. Orack* (1951) 102 C.A. (2d) 81, 226 P. 2d 644 expressed the public policy of the State of California with respect to Labor-Management arrangements similar to the one before the Court.

In the *Painters* case the legal entity used as a vehicle for Labor-Management cooperation was a non-profit corporation in the instant case, the entity used is a trust.

The Court says:

> "*Respondent is a nonprofit corporation, the members of which are representatives of associations of painting and decorating contractors in the San Francisco Bay Area,* and *representatives of unions of painting and decorating workers in that area.* Respondent was organized in order to function as a permanent joint committee under a contract executed by these associations and unions in behalf of their respective members.
>
> "Appellant is a painting contractor in the Bay Area but is not a member of any of the associations. He did, however, become a party to the agreement as a so-called nonmember signatory.

"The contract sets forth the organization and functions of respondent and provides for the establishment of local joint committees and other committees and boards. An equal number of representatives from the employer organization and the employee organization in a given locality make up the membership of a local joint committee. *A local joint committee is authorized to adjust disputes and grievances and is empowered to have access to records pertaining to violations of the agreement with authority to request testimony under oath before a notary public. Funds advanced by the signatories of the agreement are to be used exclusively for such enforcement purposes.* An employer who is not a member of one of the associations may become a party to the agreement either by joining the association or by signing the agreement individually; in the latter case such a party is designated a nonmember signatory.

"The joint committee issues shop cards to members of the association and to nonmember signatories upon the payment of a twelve dollar ($12) flat fee. Since the member of the association pays dues to it for the purpose of financing the contract, the agreement correspondingly obligates the nonmember signatories 'to deposit on account of his share of the expense of administering the contract an amount equal to the yearly dues paid by the Association.' The agreement specified the reason for this provision for financing in the following language:

" 'Such shop cards are issued for the following reasons: It is agreed that it is unfair for any person to be bound by the terms of this agreement unless other parties thereto observe it likewise. It is recognized that it would constitute unfair competition for one employer to observe reasonable working conditions

agreed upon while his competitors ignored such conditions. *To assure all parties that every party to the agreement complies therewith, it is necessary to use investigators and to maintain a central supervising agency operating as and through the Local Joint Committee. Such supervising involves expense which should as a matter of equity, be prorated on a reasonable basis among all parties who benefit by this agreement and its observance.* It is therefore agreed that the expense of supervising be borne by the Association and/or Chapters and that Shop Cards should be issued as above described to attest that the proportionate share of such expense has been met. As nonmember signatories do not share in the contribution made by the Association, such nonmember signatories shall bear a reasonable prorate on the cost of supervising and shall make a deposit on account of their share of the cost. Such deposit shall be made at the time of the issuance of the cards herein provided and in the amounts herein specified and upon the specified amounts being deposited a yearly renewal card will be issued.' '' (Emphasis added.)

(pp. 82-83.)

''*The express purpose of the agreement under which plaintiff was created was to stabilize the painting industry by creating harmonious relations and maintaining stability of conditions of employment,* the subject matter of this proceeding, first provides for the organization of the plaintiff committee, then proceeds to set out certain provisions covering apprentices, employers and unions. It then provides for the wages and working conditions of employees, and other terms and consideration as to painting work.

''Provision is made in the agreement for the supervision of the activities of the employers for the pur-

pose of assuring their conformance to the working conditions that had been established.

" 'The cost involved in supervising the conduct of the employers is borne by a fund to which members of the association are required to contribute $12, for which an official shop card is issued, and nonmembers of the association are required to pay $12 plus certain dues, and for which they receive an identification card. The dues that the nonmembers are required to pay are equal to the dues paid by the members of the associations to their associations. Defendant has contended that the agreement is unenforceable as to him because it is invalid on its face . . . *The Agreement appears clearly to be valid and enforceable.*

" '*It has been long recognized, and it is clearly a desirable situation to achieve, the employers and unions work together for stability in the industry.* As this agreement recites, if an employer enters into an agreement with the union and fails to conform to the working conditions, it would result in unfair competition among other employers, and would also create unrest, labor disturbances, and many other situations that would work to the disadvantage of public welfare. It is therefore proper for association of employers to agree on methods of procedure whereby their activities might be policed and supervised so as to insure observance of the labor agreement entered into between them.

" 'Inasmuch as this is true as to the members of the association, it certainly follows that this activity could be extended one step further and a nonmember who adheres to the agreement may well join in such an agreement for the purpose of producing stability in the industry. *It follows as a matter of course that there is a certain cost involved in supervising and*

*policing the industry. It is proper for this cost to be borne by a charge placed on the employers.* The cases cited by plaintiff in the memorandum filed: *Electrical Contractors Assn. v. Schulman Electric Co.* (1945) 391 Ill. 333 (63 N.E. 2d 392, 161 A.L.R. 787), and also *Griffiths & Sprague Stevedoring Co. v. Waterfront Employers Assn. of Pacific* (1947), 162 F. 2d 1017, clearly set forth why such agreements are not in restraint of trade. Likewise in *Minkoff v. Jaunty Junior, Inc.* (1942) 36 N.Y.S 2d 507, it is recognized that agreements entered into between employers and unions for the bettering of conditions in the industry, even where the employer is called upon to bear a charge involved therein, do not constitute illegal monopolies or restraint of trade. So here the agreement itself cannot be said to constitute a monopoly or restraint of trade. *To the contrary its provisions that would produce harmony and peace in an industrial activity are of the type that ought to be encouraged, and the court should make every effort to see that they are lived up to for the purpose of producing industrial peace that would so benefit the community.'* " (Emphasis added.)

(pp. 84-86.)

" 'There seems to be no reason whatsoever for declaring this agreement invalid. On the other hand, there seems to be ample reason to sustain the agreement. . . .' "

(p. 86.)

From the foregoing it is apparent that the public policy f the State of California favors "Union-Management Coperation" as opposed to an "Armed Truce" or mere Working Harmony."

We respectfully suggest to this court that such is the basic aim of the *Labor-Management Relations Act, 1947,* and the public policy of the United States.

In its declaration of policy Congress said:

> "Sec. 1(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all, recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest."

In *Rice-Stix Dry Goods Company v. St. Louis Labor Health Institute,* D.C.E.D. Mo. (22 LRRM 2528) (15 L.C. 74290), the Court had before it the question as to whether payments to an incorporated Health Institute was a violation of Section 302 of the *Labor-Management Relations Act, 1947.*

The Court made the following conclusions of law:

> "3. That the United Distribution Workers is a labor union within the meaning of the Labor-Management Relations Act of 1947, and said defendant represents for collective bargaining purposes, the employees of the plaintiff in the collective bargaining unit described in contract between plaintiff and the predecessor of defendant, United Distribution Workers, dated December 4, 1947.
>
> "4. That this suit arises under the Labor-Management Relations Act of 1947, and particularly Section 302 of said Act (Section 186, Title 29, U.S.C.A.) and

in the matter of controversy exceeds Three Thousand Dollars ($3,000.00) exclusive of interest and costs.

"5. That the St. Louis Labor Health Institute is a corporation, independent of the United Distribution Workers, a labor union, representative of a bargaining unit of employees of plaintiff, and the management and funds of the St. Louis Labor Health Institute are not under the control of the United Distribution Workers; nor does the United Distribution Workers have any right, title or interest in and to moneys payed to the St. Louis Labor Health Institute, or in the control or management of the St. Louis Labor Health Institute.

"6. That the St. Louis Labor Health Institute is not a representative of any employees of plaintiff as set forth in Section 302, of the Labor-Management Relations Act, 1947 (Section 187 Title 29, U.S.C.A.)

"7. That none of the moneys paid to the St. Louis Labor Health Institute are paid to any representative of any employees of any employer as set forth in Section 302 of the Labor-Management Act of 1947 (Section 186, Title 29, U.S.C.A.). (*N.B. The Union's head was the Institute's President, its Business Agent Sec.-Treas.*).

"8. That the payment to the St. Louis Labor Health Institute under the collective bargaining agreement between plaintiff and defendant United Distribution Workers formerly known as St. Louis Joint Board, Retail, Wholesale and Department Store Union, E. I. O., dated December 4, 1957, are valid and in no way a violation of the Labor-Management Relations Act of 1947."

In *United Marine Division I.L.A. v. Essex Transportaon Co.,* 216 F. 2d 410 (35 LRRM 2049) the Court says:

"The plaintiff alleges that the defendant company orally agreed to make payments to six trustees of a welfare fund. The defendants say that this oral promise, if it was made, is insufficient to hold them liable for the payments because of a provision in the Labor Management Relations Act of 1947. 28 U.S.C. 141 et seq. (1952). The district court was persuaded that this position was correct and ordered judgment for the defendants without submitting to the trier of the fact the question whether the promise to pay was made as alleged. We are, therefore, confronted at this point with a question of law solely and this question involves the interpretation of Section 186 (c) (5) (B) of the statute referred to.

"The two provisions to which we must give attention are as follows:

'(a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

'(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.' 28 U.S.C 186(a) and (b) (1952).

"It is undisputed that at the time of the alleged oral agreement there was a welfare fund set up which was operated by six trustees, three of whom were chosen by the plaintiff union and three by the Marine Towing and Transportation Employers' Association."

(p. 411)

"We are faced with the question, therefore, whether an agreement such as the one alleged comes within the prohibition of the language quoted from Section 186."

(p. 411)

". . . Our question becomes whether an agreement to pay money to these six trustees is a promise to pay to 'any representative of any of his employees.' "

(p. 411)

"We think that in this instance the promise of the employer (if indeed the promise was made) was not a promise 'to any representatives of any of his employees'. *These trustees were not, in our judgment, representatives of the employees.* It is true that they were chosen half and half by the employers' association and this union. But we think that when set up as a board, as they were in this case, these individuals are not acting as representatives of either union or employers. They are trustees of a fund and have fiduciary duties in connection therewith as do any other trustees. The terms under which they act were carefully spelled out.

"We think that the promise in this case is outside the evil which the Congress was endeavoring to erase in the sections of the statute which we have quoted. Since the fact situation is outside that evil, we do not think we should enlarge an application of the statute to void the type of arrangement which has met with legislative sanction, judicial approval and is a growing trend in employer-employee relations."

(pp. 412-413.)

We have not included *U. S. v. Ryan* (supra) since it has been previously referred to at length in this memorandum.

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THE BASIC ERROR OF THE COURT BELOW.

The basic error in the position of the court below arises from the fact that the enforcement of the collective bargaining agreement and the protection of wages, rates of pay, hours of labor and other conditions of employment is by the court below erroneously assumed to be solely and exclusively a union function.

The court below completely ignores the fact that the enforcement of the agreement and the maintenance of the negotiated wage structure and conditions as distinguished from the negotiation and bargaining concerning such condition which precede the contract is the immediate and practical concern of the employers individually and as a group.

An employer for example who violated the agreement by the non payment of Health and Welfare, Pension and Apprentice Training could reduce his competitive cost by 21.5¢ per straight and overtime hour per employee or $1.72 per straight time day per employee.

An employer who did not pay subsistance could reduce his costs $7.00 per day per employee.

Such an employer therefore could by violating the agreement on a subsistance job reduce his cost $8.72 per employee per straight time day, or $43.60 per man per straight time week.

This competitive advantage will directly injure all other employers. On a job requiring ten men the non-complying employer could without any danger to himself bid $436.00 a week less than the employer who complies with the contract.

Thus it is to the employer's direct and immediate advantage as recognized by the court in *Bay Area Painters and Decorators Joint Committee, Inc. v. Orack* (supra) to have an independent organization set up to enforce the agreements and see that the wages, hours and conditions are maintained.

That the Union per se cannot enforce such rights is clear from *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation,* 348 U.S. 437, rehearing denied 349 U.S. 935, because it is a right personal to the employee.

That a union benefits indirectly by an employer signing an agreement, that it benefits indirectly when an agreement is enforced particularly a Union Shop or Maintenance of membership clause, that it benefits indirectly every time an employee is paid, that it benefits indirectly every time the employer trains an apprentice and produces a journeyman, that it benefits indirectly every time the employer pays the salary and expenses of his representative sitting on a grievance committee, that it benefits indirectly every time the employer pays one-half the expenses of an arbitration is true.

However we respectfully submit that these are not the benefits the Congress had in mind when it spoke of "other things of value" in a statute aimed at preventing extortion.

## CONCLUSION.

While the *Labor-Management Relations Act, 1947,* as amended, is by some felt to be too liberal and by others too restrictive, we know of no one other than plaintiffs who has urged or suggested that its purpose was to turn American industry into an armed camp with Employers and Employees arrayed one against the other suspicious and distrustful of each other with the strike and lockout the rule rather than the exception.

There is nothing in the Act and nothing in its legislative history as a whole which indicates any intention or desire on the part on the Congress of the United States to prohibit co-operation between employers and employees for the general welfare of that industry which provides both with a livelihood, one by way of profits and the other by way of wages.

Rather the purpose of the Act was to recognize the fact that amicable labor-management relations were to be desired and fostered in the interest of the welfare of the general public as well as employees and employers.

To urge that, with such purposes in mind, Congress made it a crime for an employer to finance an independent agency created to foster the general welfare of the industry or train journeymen and apprentices is, we say, to pervert the statutory purpose of Congress and the Act.

To attempt to enlarge a statute which makes it criminal for an employer to bribe an employee representative or for an employee representative to extort money or any other thing of value from an employer to include independent juridical entities created to promote co

operation between employer, employees and the general public for the good of the industry as a whole is, we submit, highly prejudicial to the very purposes for which the statute was enacted.

It is not necessary to dwell on the fact that penal statutes are to be strictly construed and that this is a penal statute (Sec. 302(d)), and that it is for the legislature, and not the courts, to define the crime and extend or contract the area and persons clearly and unequivocally covered by its terms.

We respectfully subimt that payment by employers to the Plumbing and Pipe Fitting Labor-Management Relations Foundation, a trust, does not and to its trustees do not, fit the pattern of conduct prohibited by Section 302(a) or (b) of the *Labor-Management Relations Act, 1947,* as amended.

We respectfully submit that on reason and authority the Plumbing and Pipe Fitting Labor-Management Relations Foundation, a trust, is not now and never has been, and never can be a "representative" of employees, and that the trustees of said Trust are not now, never have been, and never can be, "representatives" of employees, within the meaning of Section 302(a) and (b) of the *Labor-Management Relations Act, 1947.*

Dated, San Francisco, California,
June 12, 1957.

Respectfully submitted,
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*Attorney for Appellants.*